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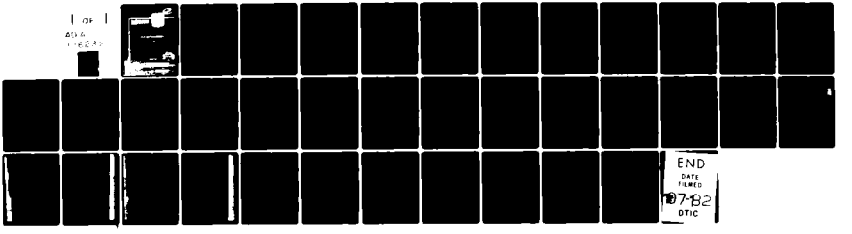

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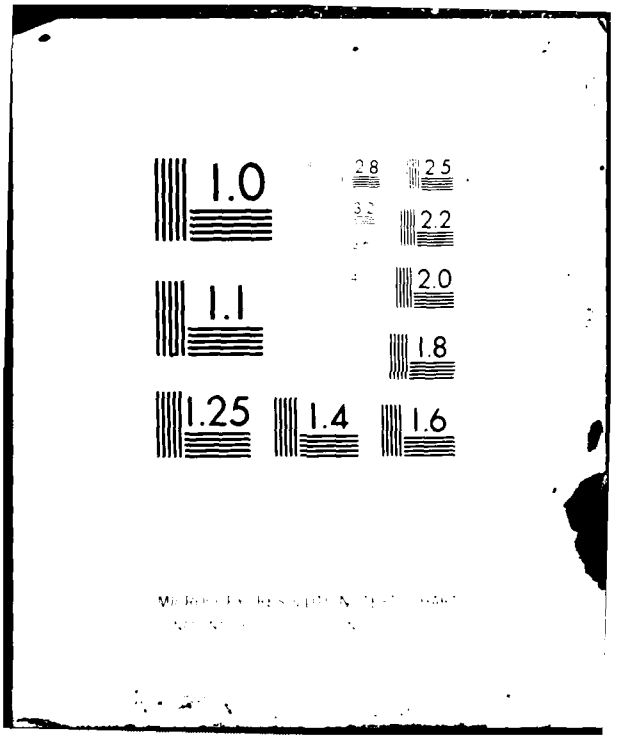
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Evaluates the freedom of Information Act's impact on the ability of national intelligence agencies to protect sensitive intelligence information, sources & methods. Contrasts this problem with those who argue that the FOIA protects basic American freedoms to insure that abuses of power do not occur. This paper does a good job of setting forth the arguments on both sides. Of particular interest is the evaluation of FOIA's impact on broad matters of national security. This essay draws the reader to a conclusion that the FIOA should be amended in the best interests of our goverments conduct of business.

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US ARMY WAR COLLEGE

INDIVIDUAL RESEARCH BASED ESSAY

IMPACT OF THE FREEDOM OF INFORMATION ACT ON THE NATONAL INTELLIGENCE AGENCIES

BY

ART LADENBURG

16 APRIL 1982

The ability of the national intelligence agencies [1] to protect sensitive intelligence information, sources, and methods has been called into question as a result of disclosure requirements of the Freedom of Information Act (FOIA). The intelligence agencies have asked for exemption from the provisions of this act, arguing that the growing perception of American government inability to protect sensitive information is drying up access to such information. The agencies also state that the volume of FOIA requests requires inordinate processing expense and creates multiple possibilities for inadvertent release of sensitve information. FOIA proponents dismiss these arguments as unconvincing and claim that these laws have helped to protect basic American freedoms and to ensure that abuses of power will not occur. This paper will set out the arguments of both sides, although with an unconcealed bias in favor of amending the FOIA to exempt the intelligence agencies.

The Freedom of Information Act was first passed in 1966. President Johnson described the Act as stemming from the principle that "a democracy works best when the people have all the information that the security of the Nation permits." The declared purpose of the Act was to broaden access to government information connected with activity impacting upon the public, with certain exceptions in areas in which Congress believed exemptions were warranted in the national interest. From 1966, until the Act was amended in 1974, there was no major impact upon the day to day functioning of the Intelligence Community.[1] Then, in 1974,

during the post-Watergate period of pressure for more openness in government, amendments to the FOIA were enacted over President Ford's veto. The Supreme Court's decision in EPA v. Mink was a key impetus for these amendments. In that case, the Supreme Court ruled that an agency must examine classified documents before invoking the FOIA exemption permitting such documents to be withheld from disclosure, but that it was not for the courts to rule on whether the classification itself might be unwarranted.

Reacting to this finding, the 1974 amendments made several fundamental changes in the Act, the most notable of which:

1) Required that reasonably segregable protions of a document not falling under the Act's exemptions be provided to the requester; and

2) Gave the courts authority to review agency determinations that records were withholdable under the Act. The courts have subsequently placed an enormous burden upon the intelligence agencies to justify classification claims. In one case, a federal court has overruled the judgement of intelligence officers that information is properly classified.

The amendments led to an explosion in FOIA requests directed at the national intelligence agencies, and a corresponding increase in associated litigation. Resources and manpower devoted to FOIA matters have, as a consequence, increased tremendously since the mid-1970's. For example, the latest annual report of the Central Intelligence Agency (CIA) on its administration of the Act contains the following statistics for calendar year 1980: 1212 new FOIA requests were received during 1980, and approximately 80 person-years of labor and over two million dollars were expended in personnel costs for processing, appeals, and

litigation related to FOIA requests.

The cost of administering FOIA is very much a secondary concern, however, in assessing the negative impact of FOIA on the national intelligence agencies. The Intelligence Community faces other problems which are far more important and far more unique. These problems stem from the fundamental incompatibility of applying the FOIA to agencies whose missions must be conducted in secret.

The situation of the National Security Agency (NSA) is illustrative in this regard, although NSA has not received nearly the volume of FOIA requests as has either the CIA or the Defense Intelligence Agency (DIA). NSA has only two missions - the acquisition of foreign intelligence information through exploitation of foreign electromagnetic signals, and the protection of the communications of the United States. The unique sensitivity of both of these missions is easily understood and has long been recognized by Congress as reflected in various statutes affecting NSA. For example, the National Security Agency Act of 1959 provides, in part, that no law:

> . . . Shall be construed to require the disclosure of the organization or any function of the National Security Agency, . . . any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

Section 798 of Title 18 U.S. Code further recognizes the extreme fragility of cryptographic information by setting out special criminal penalties for the unauthorized disclosure thereof. These special protections were considered appropriate because virtually the entire range of information generated by NSA is necessarily classified in the public interest. Whether specific NSA information relates to signals intelligence (SIGINT) or communications security (COMSEC), its inherent fragility requires that it be protected and disclosures could pose a signifi-

cant danger to the national security.

It is axiomatic that disclosures of information concerning U.S. communications security procedures could render U.S. government communications vulnerable to foreign exploitation. It takes little reflection to appreciate the fact that virtually all confidential information of the United States, whether military, diplomatic or economic, is transmitted at some time by secure communications facilities. The value of communications security is inestimable and foreign intelligence officials would go to great lengths to frustrate U.S. communications security measures in order to exploit the underlying signals. Large sums of money have been offered by foreign powers for delivery of COMSEC equipment or materials.

Signals intelligence is the opposite side of the coin. It is the exploitation of foreign electromagnetic signals. By this medium, the United States gathers significant information not available by any other means. The potential value of this collection technique is enormous, as is illustrated by the examples from World War II, which have been recently publicized, of exploitation of German and Japanese communications.

What is important to consider, as regards FOIA's impact, is the fragility of both SIGINT and COMSEC. A single inappropriate disclosure could expose NSA capabilities, identify targeted channels of communication, reveal policy-level intelligence tasking, make vulnerable U.S. communications or cause severe harm to U.S. foreign relations. The mission of NSA is such that nearly all intelligence information possessed and responsive to an FOIA request would have been derived from a foreign communication and must therefore be withheld from disclosure. To either inadvertently disclose such information or to respond with the

information requested would obviously reveal sensitive information about the Agency's abilities and interests, including such specific information as, for example, the communications channel intercepted. In some cases, even to admit the possession at NSA of requested documents would reveal sensitive information, especially when a particular communication, or information passed over specified channels, is requested. Moreover, there is no way of assuring it is just the requester who would gain this knowledge. Obviously, those who sent or received the requested communications, any intermediaries, and any other power who intercepted them would know of the communications and could determine NSA's ability to intercept them. If the message was encoded, the ability to exploit the code would be revealed. It would even be possible to learn information about NSA's technical ability to acquire, process and report such information. Of special concern is the danger of revelaing policy-level intelligence tasking, especially if certain subject matter possessed by NSA can be associated with a specific, targeted communications channel.

An inappropriate disclosure which would reveal these intelligence secrets can have unfortunate and immediate consequences. Foreign targets may avoid the channel targeted; they may upgrade codes or other methods of securing their transmissions from exploitation; they may view the disclosure as an opportunity to construct and transmit misleading information; they may also receive sufficient information to indicate an optimal direction in which to channel their own signals intelligence research and development efforts.

Fortunately, NSA has never lost a case in court so as to be required to disclose documents it sought to protect pursuant to FOIA disclosure. However, in the course of defending Agency withholdings

under appropriate exemptions, NSA has been forced to construct increasingly longer and more sophisticated affidavits - both open and in camera - to justify the Agency position. The depth of detail contained in these affidavits is alarming. Not only is NSA required to discuss the information immediately involved, and to admit on the open record the possession of certain information deriving from signals intelligence, but in order to illustrate its significance, NSA is invariably forced to reveal in the in camera affidavit information about policy-level tasking, targeted communications channels and sensitive technology. The documents required to defend withholding under FOIA, therefore, become significantly more sensitive than the underlying information itself because of the need to place in context and explain the withholding of individual documents. At the same time, the cumulative effect of the open record admissions increasingly reveals NSA activities. This problem is exacerbated by courts which seem to believe that each succeeding case requires that more about NSA be disclosed than has been previously placed on the open record. This has led some courts to refuse to even consider in camera evidence until more is stated on the open record. Sworn statements that further public record disclosures would reveal classified information have been of little avail.

NSA's concern about the increasing sensitivity and detail of the classified affidavits has been heightened by the risk the agency has faced many times that they will be revealed in whole or in part. For example, one district court ordered the disclosure of all but two paragraphs of one such affidavit, a move prevened only by prompt filing of a motion to reconsider in light of a recent appellate court decision.[2]

Other problems have also developed in the course of FOIA litiga-

tion. The 1974 amendments to the FOIA, which permitted de novo review of the classification of information, were passed, in part, on the understanding that the sworn statements of agency officials would be given "substantial weight" in these considerations.[3] Yet, some courts have been reluctant to believe these agency affidavits despite the clear, contrary Congressional intent. Certain courts have openly and pointedly factored this distrust into their written decisions. One court, for example, refused to give substantial weight to an NSA affiant — a high Agency official expert in the activities of the Agency and the consequences of releasing Agency documents — because he had not personally read each of the 500,000 pages being withheld.[4] Other courts have ordered disclosure of sensitive material, apparently because they simply did not accept Agency affidavits regarding the material, although fortunately to this date all such disclosure orders have been rescinded on subsequent appeal.

Similarly, the provision for in camera proceedings is apparently viewed with great disfavor by some courts, one court even equating such proceedings with a Star Chamber. That court refused to receive or read an in camera affidavit and awarded summary judgement to the plaintiff because the government's proof was not, therefore, in evidence.[5] Courts which perceive a dilemma in these in camera procedures have been giving serious consideration to solving it by permitting plaintiffs or their attorneys to participate in a "classified" hearing to consider the Agency's in camera submission.

Besides the problems encountered in litigation of FOIA cases, there are may more dangers inherent in the routine administering of FOIA requests. These dangers begin when a request for information is received. Because of the unique and limited role of NSA, nearly all

information produced by NSA is classified. Access to such classified and sensitive information has normally been restricted to those persons whose responsibilities included operational use of or need for that information. That historic safeguard of classified information is lost under the FOIA. The administrative process requires that many who would not ordinarily receive it be given access to the information responsive to a request. This begins with technicians who retrieve the materials, and proceeds through various administrative elements, the FOIA unit and, finally, Agency attorneys. Few, if any, of these individuals will have prior knowledge of the subject matter sufficient to instill an immediate appreciation of the importance of its many facets; often, they would not see the information under normal "need to know" criteria. This defect becomes even more acute when the process originates at another agency where the information is retrieved and handled by persons without any real knowledge of the fragility of signals intelligence or communications security information. All too often, NSA has found that persons at other agencies handling NSA material in this referral process are not appropriately cleared. In some cases, other agencies have released highly sensitive information either because they did not recognize it as NSA information or because, out of naivete or ignorance, they have ineffectively attempted to sanitize and release it themselves.

It is, of course, axiomatic that the potential for compromise rises with increased exposure, and this has certainly been the result of litigation over FOIA requests. Litigation requires that a Department of Justice attorney or an Assistant U.S. attorney represent NSA. Obviously, that attorney and at least one supervising attorney must then be cleared for access to the information. Often the case will outlast

the tenure of the government attorney assigned, thus requiring yet additional persons to gain access to the information. In addition, since NSA can rarely defend an FOIA withholding exclusively on the public record, NSA usually must prepare a detailed in camera affidavit which invariably is even more sensitive than the actual information withheld, because it contains the rationale for withholding information, usually including an explanation of targeting and the technical processes involved.

Several government attorneys must then be given access to this even more sensitive information. There has developed within the main Justice Department a cadre of attorneys experienced in and able to deal with classified information. There is more of a problem, however, with the staffs of U.S. attorney's offices around the country. This latter group of attorneys is handling an increasingly larger percentage of cases involving classified information; unfortunately, they do not, as a rule, have a background which would aid in comprehending the significance or fragility of the information. Nor do they have the constant and continuing security reminders afforded those who have continued access to the government's most sensitive information. The lack of security sensitivity of some other of the assigned legal respresentatives in dealing routinely with classified information has resulted in some serious breaches of security procedure, and contributed in at least one instance to disclosure of information NSA sought to protect. The Department of Justice attempts to deal with this problem by restricting the number of attorneys in Washington with this access, but of course, this is of little value for cases arising remote from the District of Columbia.

Cases which do arise in courts outside of the Washington, D.C. area pose additional problems concerning the storage of classified

affidavits, which problems go beyond the handling of classified information for simply FOIA purposes. Only a few U.S. courthouses are equipped to store highly classified NSA information, yet courts often require ready access to the affidavits. Moreover, federal judges are sometimes even less sensitive than attorneys to the concern for protecting such information. Top Secret Codeword affidavits have been stored by courts in insecure areas and held by individuals without either a clearance or a need to know. In one case, the court's uncleared clerk was given access to the affidavit despite the fact that the District Judge had been specifically advised that this should not be permitted. In one appellate court, several uncleared clerks of the court were permitted access to Top Secret Codeword documents. In still another case, a Top Secret Codeword document, having served its purpose, was stored in the office safe of an uncleared Department of Justice attorney.

The most stringent security measures by NSA can never completely eliminate the kind of mistakes that have occurred, resulting from the proliferation and widespread dissemination of sensitive information required by compliance with the FOIA. As a result, congressional determinations mandating special protections for cryptologic information have been rendered ineffective. It is somehow ironic that these risks are being incurred as a result of legislation whose original purpose — to make public the processes of government — really has little, if any, application to NSA, where the only assigned missions are classified in the public interest and information concerning them must normally be denied the FOIA requester. Thus, what is revealed or compromised comes through inadvertence, error or mistake. It also comes with built-in risks for the national security, for which it is difficult to see any

compensating benefits for the American public.

The negative impact on human intelligence collection activities as conducted primarily by CIA and DIA is perhaps less obvious, but no less real than the situation at NSA. A major impact has been the perception which has been created overseas regarding our country's inability to keep secrets. While this perception has been fed by leaks, unreviewed publications by former intelligence officers and the like, it is the FOIA that is viewed by many as the crux of this problem. Individual human sources and foreign intelligence services are aware of the Act and view it as a threat to America's ability to maintain the confidentiality of its intelligence sources or to protect the information they might provide. An intelligence agency cannot operate with full effectiveness under such conditions. Human intelligence is as important today as it has ever been. To obtain this intelligence it is vital that there be confidence in the ability of the United States Government to honor assurances of secrecy. Many individuals who cooperate with the intelligence agencies of the United States do so at great personal risk. Identification as a CIA or DIA agent can ruin a career, endanger a family, or even lead to imprisonment, torture or death. Our intelligence agencies must be able to convince their human sources that the fact of their cooperation with the United States will forever be kept secret and that the information they provide will never be revealed or attributed to them. The FOIA has raised doubts about our ability to make guarantees or commitments in this regard. The concept of an intelligence agency being subject to an openness in government statute is not uniformly understood by individuals and intelligence services abroad.

CIA officers have had to spend a great deal of time attempting, not always successfully, to reassure foreign intelligence services about our

security and to convince them that they should not discontinue their liaison relationships with CIA. The very fact that CIA files are subject to search and review for information which is releasable is extremely disturbing to overseas sources. There have been many cases in which individuals have refused to cooperate with our services, CIA or DIA, diminished their level of cooperation, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release. Certainly a great deal of valuable information has been lost to the United States as a result.

It is not only foreign sources of intelligence information who feel threatened by the FOIA's applicability to the CIA. The FOIA has impacted adversely on CIA domestic contacts as well. Many Americans acquire valuable foreign intelligence as a consequence of employment or travel overseas, or through foreign friends, relatives or professional contacts. Most of these Americans are willing to volunteer information when they have it but, for business and other reasons, many insist that CIA protect the fact of their cooperation and the information which they provide. A growing number, however, in assessing the risk of disclosure, determine that it is not in their best interest to cooperate. They find their sense of patriotism frustrated by an obligation that their private interests not be jeopardized. For example, the head of a large American company and former cabinet member commented to a senior CIA official that he thought any American company with interests overseas, would be out of its mind to cooperate with CIA as long as the provisions of the FOIA apply to it. In the final analysis, it is this type of perception, whatever the reality may be, which counts.

The search and review of CIA records in response to FOIA requests poses a special set of problems. The CIA's records systems are an integral part of the agency's security system. The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under the FOIA. Under the "need to know" principle, CIA employees normally have access only to information necessary to perform their assignments, but the process of compiling documents responsive to FOIA requests is incompatible with good "need to know" practices.

The search for information responsive to an FOIA request is a time-consuming task. A relatively simple FOIA request may require as many as 21 CIA record systems to be searched. Still it is not the quantity of time and effort devoted to FOIA that is of ultimate concern at CIA. It is rather the level of employees who must become involved in the review process, the types of highly trained people who must participate in the processing of an FOIA request. When CIA records are located in response to an FOIA request, the documents must be carefully reviewed in order to determine which information can be released safely and which must be withheld, in accordance with applicable FOIA exemptions, in order to protect matters such as the security of CIA operations or the identities of intelligence sources. In other government agencies, the review of information for possible release under the FOIA is a routine administrative function; in the CIA it can be a matter of life or death for human sources. In some circumstances, mere acknowledgement of the fact that CIA has any information on a particular subject or has engaged in a particular type of activity could be enough to place the source of that information in danger, compromise ongoing intelligence operations, or

impair relations with foreign governments. Agency records must be scrutinized with great care, because bits of information which might appear innocuous on their face could possibly reveal sensitive matters if subjected to sophisticated analysis or combined with other information available to FOIA requesters.

This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case in many other government agencies whose information has no such sensitivity. The need for careful professional judgement in the review of intelligence information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities involve particpation in, or management of, vital programs of intelligence collection and anlaysis for the President and our foreign policy-making establishment. These reviewing officers are not FOIA profesionals, they are intelligence officers who are being diverted from their primary duties. This diversion is impacting adversely upon the fulfillment of intelligence missions.

As of the end of 1981, the CIA had been sued over 200 times under the FOIA. Of those cases which have been decided, with only one exception, the result has been judicial affirmance of the claimed national security exemption. One recent example is the decision in a lawsuit brought by Phillip Agee against the CIA, FBI, NSA, Department of State, and Department of Justice. In his opinion, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia stated: "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails." The fact remains, however, that judges with no expertise in

the arcane business of intelligence may believe that under the provisions of the Act they can overrule an intelligence agency's decision as to the classification of particular documents and order their release. In the one exception mentioned above, the Court of Appeals has upheld a district court decision specifically overruling a CIA classification determination.[6] Final resolution of this case is still pending. While the CIA has succeeded thus far in protecting what it considers to be sensitive national security information, the successful litigation record has been achieved at an enormous cost in quality manpower resources.

Many FOIA requests to the national intelligence agencies are sent via a form letter. Requests received from universities often follow this pattern and generally speaking are extremely broad, for example asking for all information CIA has on relationships between CIA and the university and between CIA and university staff or officials.

Other requests are of the curiosity variety. To most of these, agencies are able to provide only a limited number of documents but must, nonetheless, expend many fruitless manhours in arriving at that conclusion. Many others are from foreigners, probably including representatives of hostile intelligence services and clearly some from those whose apparent purpose in writing is to uncover information which would do harm to this nation's interests overseas.

A number of FOIA requests are from individual authors. In one case, CIA devoted the total efforts of one person full-time for a period of 17 months. This again is for a single request by one individual. CIA has also expended over four man-years on FOIA requests from Philip Agee, who is an admitted adversary of the CIA, dedicated to exposing the identities of CIA officers serving undercover.

Judging from the large number of seemingly genuine or honest requests for information which are received on U.S. personalities or on topics totally unrelated to foreign intelligence, apparently a surprising number of people believe that the CIA has an all-inclusive record system. Normally in these cases, there is no information available on the individual or subject matter in question, but still extensive file searches must first be conducted before the negative response can be sent out. In a recent hearing on an FOIA suit, Judge Aubrey Robinson made the following pertinent comments:

> It is like trying to run a business and have an audit at the same time, and that's the position that many of these agencies are put in with the kinds of requests that are made of them and they come from all over the world as you well know -- all over the country, not necessarly all over the world -- but fantastic, and one of these days, I don't see how some of these agencies can operate. Everybody who wants to write a newspaper article, everybody who has had an argument over the dinner table with his wife, everybody who wants to write a book, everybody who goes to jail and doesn't have anything else to do starts filing freedom of information act requests. If the public knew, if Congress ever costed out this thing, I think they would take another look at it.

The comment regarding people in jail applies in particular to the FBI, which has been required to respond to hundreds of requests for all types of information from prison inmates.

Intelligence agencies have also found an increase in appeals and litigation cases resulting from their inability to respond to FOIA requests within the stringent time provisions of the FOIA.[7] This litigation then tends to delay initial processing of new cases because of court imposed deadlines on cases in process, which feeds the frustrating cycle of more delayed cases and more litigation. Despite commitment of more than 80 man-years per year, CIA's backlog continues to grow. This manpower commitment is far greater that the manpower CIA is able to spend on any one of several areas of high intelligence interest to the

United States.

Even with the intelligence agencies diverting this much personnel time to comply with the present statute, there still exists the very real possibility that an orchestrated effort by persons hostile to the United States could literally swamp the agencies with FOIA requests. Pursuing the entitlement which any person in the world now has under the law, those persons could perfectly legally make unlimited requests and follow up with litigation. Quite effectively, and entirely within the U.S. legal framework, they could sabotage the normal mission of one or more of our national intelligence agencies.

After several fruitless years of seeking legislative formulas which would provide relief from the more onerous or dangerous impacts of FOIA on their operations, the intelligence community in 1981 finally came to the general conclusion that effective relief could only come in the form of complete exemption from the provisions of FOIA. Partial steps were too easily skirted and would simply have rechanneled the various problems. For example, restricting FOIA access to Americans would not have been effective since foreigners, particularly intelligence services or other hostile foreign groups and individuals, could easily have found Americans to front for them. Requiring that requests be limited to one specific subject of manageable proportions rather than permitting blanket omnibus-type requests, which cover a wide date span and a variety of topics, would help, but could be finessed by merely submitting several related requests in lieu of one complex request. Charging requesters for the cost of agency review time would probably only breed more litigation since requesters would still have the right to ask that all fees be waived in the public interest, and in two recent court cases

judges have overruled CIA's refusal to waive fees.

Consequently, CIA, DIA and NSA have submitted legislation requesting total exemption from FOIA. They argue that only a total exclusion of their records from all of the FOIA's requirements can, by completely eliminating the need to search and review records in response to FOIA requests, end the wasteful and debilitating diversion of resources and critically needed skills, eliminate the danger of inadvertent or of court-ordered release of properly classified information, and regain the confidence of human sources and foreign intelligence services.

Opposition to any legislation further restricting FOIA application to the intelligence agencies has been led by the American Civil Liberties Union (ACLU) and various organizations of journalists, acamedicians, and historians. They argue that the intelligence community has ample authority under the current FOIA to protect classified information and intelligence sources and methods. They point out that the intelligence agencies have used the act effectively and to date not one sentence has been released to the public under a court order in circumstances where one of the agencies has argued that release could injure the national security.

Regarding the problem of "perception" or "misperception" on the part of foreign intelligence officers and foreign or domestic sources of information that secrets are not protectable under the FOIA, they argue that this misperception cannot be solved by amending the FOIA. They maintain that the perception is also based on the reality of leaks, lapses in security, congressional oversight, the publication of intelligence officer memoirs (censored and uncensored), civil lawsuits, and other factors having nothing to do with the FOIA. In light of all of the ways in which intelligence information is from time to time actually

compromised, it is unwarranted to focus on the phantom factor that federal judges will irresponsibly reveal information.

Opponents of legislative relief argue that the national intelligence agencies understate the adverse impact of the proposed exemption on the public's right to know. They maintain that considerable amounts of information regarding CIA and other intelligence operations have been released under the FOIA. Through the FOIA, the public has learned more about the Bay of Pigs invasion, mind-drug experiments, and CIA spying on Americans. They say that much of the information so acquired was not included in Congressional reports on the CIA and some of it makes clear that CIA operations were more extensive than official investigations had indicated.

They also maintain that Congressional oversight is no substitute for public accountability of the intelligence agencies under FOIA. They maintain that disclosures under the FOIA have shown, for example, that the CIA did not turn over all information about past operations to the Congress and that Congressional committees have not always made relevant information available to the public. The FOIA has independently added to the public record of the intelligence agencies.

The importance of the FOIA to supplement the reports of Congressional committees can be illustrated by the information which has been released under the FOIA related to the CIA's use of academics. The Church committee discussed then current CIA practices only in the most elliptical manner, while calling upon universities to establish guidelines to control what the committee described as a threat to the integrity of American universities. FOIA cases initiated by the ACLU have pried loose some additional details about the program of secret

relations with university professors to assist the CIA in recruiting foreign students and two cases seeking more information are pending in the courts. But even what has been released so far has been of great value in alerting professors and universities to the issues and in enabling them to participate in the current debate about whether such use should be prohibited in the intelligence charter.

Defenders of the FOIA status quo also argue that judicial review plays an essential role in preventing abuses and keeping the American people informed, even if the courts seldom or never order the intelligence agencies to release material. They argue that the simple knowledge that a judge may examine material in camera leads the intelligence agencies, their attorney, and the Justice Department attorneys, to take a hard look at the requested material and to decide if its withholding is really justified. They believe that the record since 1974 has been positive and that there is nothing in the record to show that it has harmed the national security. The ACLU states that the nation's intelligence agencies are better and more responsible organizations as a result of the 1974 amendments to the FOIA, the public is better informed, and that the law should not be changed.

Attached, herewith, is a copy of the Freedom of Information Act. Also attached are copies of S.1273 and S.1235, which are two of the several bills now being considered by the Congress which would shelter or exempt the national intelligence agencies from the provisions of FOIA.

ENDNOTES

1. When used in this paper, the terms National Security Agencies and Intelligence Community will normally refer specifically to the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency.

2. Baez V. National Security Agency, Civilian Number 76-1921 (D.D.C., 2 November 1978).

3. Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974, 94th Cong. 1st Sess. 229 (1975).

4. Hayden v. National Security Agency, 608 F.2d 1381 (D.C. Cir. 1979).

5. Weberman v. National Security Agency, 480 F. Supp. 9 (S.D.N.Y. 1980).

6. Holy Spirit Association for the Unification of World Christianity v. Central Intelligence Agency, 636 F.2d 838, 845-46 (D.C. Cir. 1980).

7. Agencies have ten working days to decide whether to comply with a request, and 20 working days to respond to appeals. Upon notification to the requester, agencies may invoke an extension of ten working days to the time allowed for processing either the request or the appeal (but not both). The only circumstances justifying such an extension are that the records are stored in remote locations, that the records are voluminous, and/or that intra-or intergency clearances are required. The failure of an agency to meet deadlines permits the requester to go directly to court.

II

97TH CONGRESS
1ST SESSION

S. 1235

To exempt certain matters relating to the Central Intelligence Agency from the disclosure requirements of title 5, United States Code.

IN THE SENATE OF THE UNITED STATES

MAY 20 (legislative day, APRIL 27), 1981

Mr. D'AMATO (for himself, Mr. GOLDWATER, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To exempt certain matters relating to the Central Intelligence Agency from the disclosure requirements of title 5, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (a) of section 552 of title 5, United States Code, is amended—

(1) by striking out "(B) On" in paragraph (4) and inserting in lieu thereof "(B)(i) Except as provided in clause (ii), on"; and

(2) by adding at the end thereof the following:

"(ii) No court of the United States shall have jurisdiction to enjoin the Central Intelligence Agency from withholding Agency records or to order the production of such records which are being withheld, unless such records are the personnel records of an individual the disclosure of which is necessary for obtaining employment by such individual outside the Agency.".

(b) Subsection (b) of section 552 of title 5, United States Code, is amended—

(1) in paragraph (2), by inserting before the semicolon at the end thereof the following: "other than the Central Intelligence Agency or, in the case of the Central Intelligence Agency, related to the internal personnel rules and practices of such Agency or to the training or reorientation of personnel of such Agency";

(2) in paragraph (6)—

(A) by inserting "of an agency other than the Central Intelligence Agency" after "similar files"; and

(B) by inserting before the semicolon at the end thereof the following: "or, in the case of the Central Intelligence Agency, any personnel, medical, or other similar files of such Agency (other than personnel records the disclosure of which is

necessary for obtaining employment outside such Agency)";

(3) by amending paragraph (7) to read as follows:

"(7) investigatory records compiled for law enforcement or national intelligence purposes, but only to the extent that the production of such records would—

"(A) interfere with enforcement proceedings,

"(B) deprive a person of a right to a fair trial or an impartial adjudication,

"(C) constitute an unwarranted invasion of personal privacy,

"(D) disclose the identity of a confidential source and—

"(i) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, confidential information furnished only by the confidential source, or

"(ii) in the case of a record compiled by an agency conducting a lawful national security intelligence investigation, confidential information furnished by the confidential source,

"(E) disclose investigative or national intelligence techniques and procedures, including intelli-

gence techniques and procedures relating to special activities, clandestine collection, or covert operations of the Central Intelligence Agency, or

"(F) endanger the life or physical safety of law enforcement or national intelligence personnel;";

(4) by striking out "or" at the end of paragraph (8);

(5) by striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon;

(6) by inserting after paragraph (9) the following:

"(10) related to special activities, clandestine collection, or covert operations of the Central Intelligence Agency; or

"(11) related to any internal operation, office management, or organization of the Central Intelligence Agency."; and

(7) by inserting before the period at the end of the second sentence a comma and the following: "except that no record of the Central Intelligence Agency shall be provided to any such person if any portion of such record is exempt under this subsection".

(c) Subsection (e) of section 552, title 5, United States Code, is amended to read as follows:

"(e) For purposes of this section—

"(1) the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) the term 'clandestine collection' means the acquisition of intelligence information in ways designed to assure the secrecy of the operation;

"(3) the term 'covert operations' includes clandestine collection and special activities; and

"(4) the term 'special activities' means activities conducted abroad in support of national foreign policy objectives which are designed to further official United States programs and policies abroad and which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but not including diplomatic activity or the collection and production of intelligence or related support functions.".

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97TH CONGRESS
1ST SESSION

S. 1273

To amend the Central Intelligence Agency Act of 1949, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 21 (legislative day, APRIL 27), 1981

Mr. CHAFEE (for himself and Mr. GOLDWATER) introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

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A BILL

To amend the Central Intelligence Agency Act of 1949, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Intelligence Reform Act of 1981".

SEC. 2. Section 6 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403g) is amended to read as follows:

"SEC. 6. In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. 403(d)(3)) that the

Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of any law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or number of personnel employed by the Agency. In furtherance of the responsibility of the Director of Central Intelligence to protect intelligence sources and methods, information in files maintained by an intelligence agency or component of the United States Government shall also be exempted from the provisions of any law which require the publication or disclosure, or the search or review in connection therewith, if such files have been specifically designated by the Director of Central Intelligence to be concerned with—

"(1) the design, function, deployment, exploitation, or utilization of scientific or technical systems for the collection of foreign intelligence, counterintelligence, or counterterrorism information;

"(2) special activities and foreign intelligence, counterintelligence, or counterterrorism operations;

"(3) investigations conducted to determine the suitability of potential foreign intelligence, counterintelligence, or counterterrorism sources; and

"(4) intelligence and security liaison arrangements or information exchanges with foreign governments or their intelligence or security services.

Notwithstanding the preceding sentence, requests by United States citizens and by aliens who are lawfully admitted for permanent residence in the United States for information concerning themselves made pursuant to any provision of law shall be processed in accordance with such provision. The provisions of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of the Intelligence Reform Act of 1981 and which specifically repeals or modifies the provisions of this section.".

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A. DISCLOSURE AND PROTECTION OF INFORMATION

SECTION 552 OF TITLE 5, UNITED STATES CODE (THE "FREEDOM OF INFORMATION ACT")

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comments, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set

forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acting arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making

such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters by withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commerical of financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F) and (G). Such reports shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

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